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No. _____

JOSEPH F. SPANIOLO, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1990

RICHARD R. SYRE,

Petitioner,

vs.

PENNSYLVANIA,

Respondent.

On Petition For A Writ Of Certiorari
To The Pennsylvania Superior Court

PETITION FOR WRIT OF CERTIORARI

RICHARD R. SYRE, pro se
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QUESTION PRESENTED FOR REVIEW

Does an appellate court acquittal setting aside a conviction on grounds that the prosecutor's evidence is insufficient to sustain the conviction bar government appeal under the Double Jeopardy Clause?

PARTIES TO THE PROCEEDINGS

PETITIONER: Richard R. Syre, *pro se*
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RESPONDENT: Philadelphia District Attorney
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**On Petition For A Writ Of Certiorari
To The Pennsylvania Superior Court**

PETITION FOR WRIT OF CERTIORARI

STATE COURT RULING SUBJECT TO REVIEW

Appeal is taken from Judgment of the Pennsylvania Superior Court entered March 27, 1990, affirming Judgment of sentence of the Philadelphia Court of Common Pleas which judgment became final when the Pennsylvania Supreme Court denied Petition for Allowance of Appeal on September 6, 1990.

JURISDICTIONAL STATEMENT

Jurisdiction of the United States Supreme Court is invoked pursuant to 28 U.S.C. 1257(3).

VERBATIM CONSTITUTIONAL PROVISION

Fifth Amendment to the United States Constitution:

" . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . "

STATEMENT OF THE CASE

This appeal concerns the legality of a sentence entered by the trial court after the state court of appeals entered a verdict of acquittal on the same charges. In 1981 your Petitioner, Richard Syre, a practicing attorney, was convicted by a jury of witness tampering. The trial court originally sentenced Syre to provide community legal services for a year and stay within 100 miles of Philadelphia.

Syre rejected the sentence as unlawful because it conditioned his continued practice of law on admitting witness tampering, which had not been proven, while it punished him for appealing the unjust conviction by disbarment through enforcement of rules of automatic suspension. On appeal Syre requested retrial citing numerous trial errors. He also appealed the trial court's denial of his demurrer accepting the cost of automatic suspension from the practice of law as the price of appeal.

On appeal the Pennsylvania Superior Court acquitted, finding the evidence insufficient to sustain the conviction. *Commonwealth v. Syre*, 469 A.2d 1059 (Pa. Super. 1983). On government appeal the Pennsylvania Supreme court reversed and remanded. *Commonwealth v. Syre*, 489 A.2d 1340 (Pa. 1985). The Pennsylvania Superior Court reversed the conviction a second time finding official jury interference. *Commonwealth v. Syre*, 501 A.2d 671 (Pa. Super. 1985). On Government appeal the Pennsylvania Supreme Court reinstated the sentence a second time but without remanding, leaving many claims of trial error unresolved. *Commonwealth v. Syre*, 518 A.2d 535 (Pa. 1986), cert. denied, 107 S.Ct. 1577 (1987).

During the course of these proceedings the United States Supreme Court ruled that double jeopardy barred the government from appealing an evidentiary insufficiency decision. *Smalis v. Pennsylvania*, 476 U.S. 104 (1986). In numerous proceedings Syre unsuccessfully challenged the jurisdiction of courts to enforce any judgment that disregards his acquittal. *Syre v. Pennsylvania*, 662 F.Supp. 550 (E.D.Pa., 1987); affirmed, 845 F.2d 1015 (3d Cir. 1988); cert. denied, 102 L.Ed. 112 (1988). *Syre v. Williquette, Vilas County Sheriff*, 441 N.W.2d 756 (Wis. App. III, 1989); cert denied, 58 LW 3217.

After extraditing Syre from Wisconsin to Pennsylvania the Philadelphia trial judge imposed a modified sentence of 200 hours community service claiming jurisdiction under authority created by the Pennsylvania Superior Court in *Commonwealth v. Fitzhugh*, 520 A.2d 424 (Pa. Super. 1987). On appeal, the Pennsylvania Superior Court dismissed Syre's jurisdictional challenge as "meritless." Appendix 1-4.

Your Petitioner seeks a writ of certiorari because an appellate court acquittal, which forecloses error correction by barring retrial, is not protected from arbitrary nullification when the government may appeal the appellate court acquittal.

ARGUMENT

SUMMARY OF ARGUMENT

In discharging a defendant on grounds that the evidence is insufficient to sustain a conviction beyond a reasonable doubt the appellate court finds "that the government's case was so lacking that it should not have even been *submitted* to the jury." *Burks v. United States*, 437 U.S. 1, 16 (1978). If this judgment of the appellate court is presumed to be honest and competent then there cannot be a subsequent finding by a higher court that there is proof beyond a reasonable doubt on the same evidence that the lower appellate court rejected as insufficient without impeachment of the court.

VERDICT NULLIFICATION

Double jeopardy is a matter of simple logic and the Constitution's concern for the independence and integrity of the court. Yet legal journals bemoan the "poor state of health" of Supreme Court double jeopardy analysis. *Double Jeopardy: Are the Pieces the Puzzle?*, McKay, 23 Washburn Law Journal 6 (1983). The United States

Supreme Court deprecates its own double jeopardy jurisprudence as an unnavigable "Sargasso Sea". *Albernaz v. United States*, 450 U.S. 333, 343 (1981).

In *Burks v. United States*, the U.S. Supreme Court ruled for the first time that double jeopardy bars retrial after the appellate court finds the evidence insufficient to sustain a conviction since the ruling is an acquittal – a "resolution, correct or not, of some or all of the elements of the offense charged." (Hereinafter referred to as a court ordered acquittal or verdict of not guilty.) By its terms this definition excludes government appeal. Nevertheless, government appeal of court ordered acquittals continued.

In *Smalis v. Pennsylvania*, 476 U.S. 104 (1986), the Supreme Court ruled that double jeopardy barred government appeal of a pre-verdict trial court ordered acquittal because it is a decision "on the facts" not "on the law." Nevertheless, government appeal of post-verdict court ordered acquittals continues in most, if not all, jurisdictions for lack of understanding of double jeopardy principles.

In reversing a jury conviction for lack of evidence the court, unlike the jury, must presume the honesty and integrity of the prosecutor's evidence. The court acquits on narrower grounds, namely, the rational deficiency of the proof. The court's conclusion, if it is in turn presumed to be honest and competent, must end the prosecution.

As regards verdicts, the fact/law distinction in double jeopardy jurisprudence is unfortunate because it introduces a level of abstraction concerning the ultimate distinction between fact and law that has little to do with

the practical standard of "proof beyond a reasonable doubt." A more fruitful inquiry asks what definitions of fundamental terms are necessary within an accusatory process.

The standard of proof in a criminal case cannot be so low as to allow the innocent to be easily convicted. Neither can the standard of proof be so high that the guilty are never convicted. Consequently, proof is defined in terms of a consensus between reasonable minds as to whether or not the government proved its criminal charges.

"Proof beyond a reasonable doubt" is defined in terms of the reasonableness of those selected to decide guilt or innocence. When no consensus as to proof beyond a reasonable doubt is possible because the prosecutor's evidence is rationally deficient the court has the duty in law and conscience to terminate the proceedings on grounds restricted to a finding that a reasonable person could not conclude beyond a reasonable doubt that the defendant is guilty.

Criminal charges can be proven to be true or false because they are specific allegations of fact. Innocence is verified only by the decision maker's expression of doubt in a general verdict of not guilty which is presumed to be an honest and competent judgment.

Reinstatement of a conviction, set aside for lack of evidence, impeaches the court that acquitted by rejecting the presumption. If the acquittal was a just one setting aside a false conviction, perhaps one secured through official jury interference, the higher court would impeach

itself absolutely on specific allegations of fact the falsity of which can be proven.

Acquittals sometimes are specific apparently creating the same problem of self-impeachment. When defendants offer affirmative defenses the court ordered verdict of not guilty appears to be based upon the defendant's specific factual claims, (self-defense, accident, lack of intention, etc.) not his general denial of guilt.

When the facts as pleaded by the defendant do not meet the requirements of law for justification of the crime an incorrect court ordered acquittal in content, but not in form, constitutes a ruling "on the law" where reasonable minds may disagree. This is a source, perhaps the only honest one, for the notion that evidentiary insufficiency decisions are rulings "on the law."

To protect the accusatory process from self-impeachment the defendant is not permitted to plead and prove facts. He is presumed innocent until proven guilty. This form of proceeding must be consistent and, therefore, when the defendant succeeds with an affirmative defense the verdict of not guilty is still restricted in its meaning to a failure of government proof.

In the administration of the accusatory process the honesty and competency of the decision makers is always presumed. No principled review of decisions is possible otherwise.

The Constitution, on the other hand, assumes that judges and prosecutors are not perfect – that the accusatory process will be used occasionally to oppress rather than to seek the truth. The Bill of Rights acknowledges

the probability of certain abuses of the accusatory process in its enumeration of trial rights.

There can be correction of error but not placing of blame within the same proceedings. The double jeopardy bar on government appeal protects the verdict from arbitrary nullification. The double jeopardy bar on retrial denies to the prosecutor unlimited power to retry. Double jeopardy does not, however, bar the court from ordering a retrial to cure trial errors that render a fair trial questionable when there is no verdict terminating the proceedings.

FACT/LAW CONFUSION AS TO LEGAL RULINGS

Much confusion in double jeopardy jurisprudence stems from failure to define the verdict of not guilty, as discussed above. Another source of confusion is the misconception that the "hardship of retrial" on the defendant is the evil at which double jeopardy is aimed.

When retrial is the prohibited evil, then any decision "after jeopardy attaches" in favor of the defendant that makes retrial necessary becomes a judgment that is "absolutely final, correct or not." On the other hand, any decision in favor of the defendant that can be reversed without the necessity of a retrial is not final. When timing of the decision in favor of the defendant is essential to the question of finality the question of finality is governed by accident not principle.

In *Burks v. United States*, 437 U.S. at 14-15, the United States Supreme Court noted that failure to make the

distinction between "reversals due to trial error and those resulting from evidentiary insufficiency" was the source of "conceptual confusion" in double jeopardy jurisprudence. *Burks* and *United States v. Scott*, 437 U.S. 82 (1978), decided the same day, correctly eliminated timing distinctions in finding that retrial of the defendant was barred only when the facts were found in his favor. Post *Smalis* decisions such as *Fitzhugh* allow government appeal when a jury conviction, set aside on grounds that the evidence is insufficient to sustain the conviction, can be reinstated "because no retrial is required – the court can simply reinstate the original verdict." Appendix 3. This statement begs the question that the original verdict is free of trial error review of which is made unnecessary by the general verdict of not guilty simply nullified on government appeal. These decisions make the finality of the verdict of not guilty turn on when it is entered not what it means. They contradict the holdings of *Burks*, *Scott*, and *Smalis*.

The United States Supreme Court correctly limits the definition of verdict to the fact finder's decision on the evidence that is material to the charges – the government's accusations. *Scott*, at 97-98. The absolute finality of verdicts is, therefore, clear as a matter of definitions compelled by the structure and purpose of the accusatory process.

It does not follow, however, that all other decisions favorable to the defendant setting aside convictions are in principle indistinguishable as rulings "on the law" where reasonable minds may disagree. The double jeopardy bar on government appeal must be broader than the bar on retrial.

Questions concerning what happened during the trial process involve factual allegations made by the defendant, proof of which is not governed by the rules of the accusatory process. These are contested jurisdictional facts. Some jurisdictional facts, such as the existence of a verdict, proven conclusively by the trial record, are beyond denial. Others, such as court deliberations, are beyond inquiry. Contested jurisdictional facts concerning what happened at trial require limited fact finding for the limited purpose of deciding on the need for a retrial.

Facts bearing on unfair trial procedures are shown by lesser standards of proof in a process that is not accusatory: The court is not neutral but an involved party; reason to believe is at issue not proof beyond reasonable doubt; punishment is not the objective of the proceeding but rather retrial or termination; and there is not a presumption of innocence – on the contrary there is often a strong, sometimes conclusive, presumption of trial error.

A line of Supreme Court cases wherein the Court states that the appellate court will not defer to factual determinations by the lower court suggests an area where government appeal might be barred by double jeopardy. *Miller v. Fenton*, 474 U.S. 104 (1985). When those determinations of jurisdictional fact are made in the defendant's favor, the government should be barred from appeal when it has the option to retry the defendant.

No government interest is advanced by allowing government appeal of a finding of official interference with jurors. In an extreme case where the prosecutor interferes with jurors, the appeal itself is an obstruction of justice that serves the prosecutor's general denial of

wrongdoing while it burdens the judicial system with vexatious compromise.

Government appeal is less objectionable where the lower court wrongly suppresses evidence of guilt or where the incorrect finding of error, such as pre-indictment delay, bars the government from retrying the defendant.

A consistent double jeopardy theory is already indicated by the United States Supreme Court rulings. Unquestionably verdicts bar both retrial and government appeal. It is safe to predict that further limitations on government appeal in criminal cases will parallel statutory schemes that were abandoned as the Supreme Court struggled to define double jeopardy.

CONCLUSION

Your Petitioner requests that the United States Supreme Court specifically overrule *Fitzhugh* and like cases in all jurisdictions as inconsistent with its present understanding of double jeopardy by granting certiorari to the Superior Court of Pennsylvania and setting aside the Petitioner's sentence entered after the Pennsylvania Superior Court acquitted your Petitioner.

Respectfully submitted,

RICHARD R. SYRE

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APPENDIX

COMMONWEALTH OF	:	IN THE
PENNSYLVANIA	:	SUPERIOR
	:	COURT OF
v.	:	PENNSYLVANIA
RICHARD SYRE,	:	No. 02243
	:	Philadelphia
Appellant	:	1989
	:	

Appeal from the Judgment of sentence August 23, 1989 in the Court of Common Pleas of Philadelphia County, Criminal, July Term, 1981, No. 2676, 8107-2671 1/1.

(FILED MAR 27 1990)

BEFORE: CIRILLO, P.J., and CERCONE and HESTER, JJ.

MEMORANDUM:

This is an appeal from a judgment of sentence entered in the Court of Common Pleas of Philadelphia County. Appellant Richard Syre, a practicing attorney, was convicted by a jury of tampering with a witness. Following trial, Syre was sentenced to two years probation and one year of community service. Syre was also ordered to stay within a 100 miles radius of Philadelphia. Syre filed a direct appeal and this court reversed, finding the evidence was insufficient to support a conviction of tampering with a witness. *Commonwealth v. Syre*, 322 Pa. Super. 416, 469 A.2d 1059 (1983). The Pennsylvania Supreme Court granted the Commonwealth's petition for allocatur and reversed, concluding that the evidence was sufficient to support the verdict. *Commonwealth v. Syre*, 507 Pa. 299, 489 A.2d 1340 (1985). Judgment of sentence

was reinstated, and the case was remanded for consideration of Syre's remaining claims. This court, on remand, again reversed the judgment of sentence, finding that an officer of the trial court had engaged in improper communications with the jury during the trial. *Commonwealth v. Syre*, 348 Pa. Super. 110, 501 A.2d 671 (1985). The Pennsylvania Supreme Court granted the Commonwealth's second allocatur petition, reversed this court, and again reinstated judgment of sentence. *Commonwealth v. Syre*, 513 Pa. 1, 518 A.2d 535 (1986).

The sentencing court reimposed Syre's sentence, which had been stayed pending appellate proceedings. Thereafter, the Commonwealth filed a petition for revocation of probation because Syre had refused to comply with the condition that he remain within a 100 mile radius of Philadelphia. Following a hearing, the court sentenced Syre in accordance with the previous sentence, but vacated the requirement that he remain in Philadelphia and permitted him to remain under the supervision of Wisconsin officials. In addition, the court required Syre to undergo psychiatric counseling. This appeal followed.

On appeal, Syre argues that the principles of double jeopardy should have barred the Commonwealth's appeal of this court's decision on the issue of sufficiency of the evidence, which resulted in his discharge, and that the court of common pleas should have discharged him on the basis of double jeopardy. We disagree.

In *Commonwealth v. Fitzhugh*, ___ Pa. Super. ___, 520 A.2d 424 (1987), this court specifically rejected the

argument that double jeopardy principles bar the Commonwealth's appeal of an evidentiary insufficiency decision entered by an intermediate appellate court, such as this court:

[W]e find that an arrest of judgment entered following a jury verdict of guilt does not become the functional equivalent of a verdict of acquittal until a final appellate decision upon the legal sufficiency of the evidence is made in the defendant's favor. A decision by an intermediate appellate court, including a trial judge entertaining post-trial motions, does not terminate the initial jeopardy. Thus, the Commonwealth may properly appeal the order granting an arrest of judgment.

Id. at 226, 520 A.2d at _____. Thus, where a defendant is acquitted of the crime or crimes charged, initial jeopardy terminates. A subsequent prosecution would subject the defendant to fact-finding proceedings, and again place the defendant in jeopardy. See *Commonwealth v. Smalis*, 331 Pa. Super. 307, 480 A.2d 1046 (1984), *rev'd sub nom. Commonwealth v. Zoller*, 507 Pa. 344, 490 A.2d 394 (1985), *rev'd sub nom. Smalis v. Pennsylvania*, 476 U.S. 140 (1986). Thus, unlike a verdict of acquittal, which, for purposes of the double jeopardy [sic], terminates the initial jeopardy, a guilty verdict carries the initial jeopardy through the appellate process because no retrial is required – the court can simply reinstate the original verdict. See *Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294, 308-309 (1984) (when acquittal is entered by the original finder of fact, the initial jeopardy terminates; but when a verdict of guilt is delivered, the original jeopardy continues through the appellate process).

Here, Syre was convicted by a jury. The jeopardy which attached at that trial did not terminate upon conviction, as it would have had he been acquitted. Thus, since initial jeopardy did not terminate, Syre was not twice placed in jeopardy. We therefore conclude that Syre's jurisdictional challenge is meritless.

Affirmed.

COMMONWEALTH OF	:	IN THE
PENNSYLVANIA	:	SUPERIOR
	:	COURT OF
v.	:	PENNSYLVANIA
RICHARD SYRE,	:	No. 02243
	:	Philadelphia
Appellant	:	1989
	:	

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of PHILADELPHIA County be, and the same is hereby AFFIRMED.

BY THE COURT:

/s/ David A. Szewczak
PROTHONOTARY

Dated: MARCH 27, 1990

